United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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76-5013

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

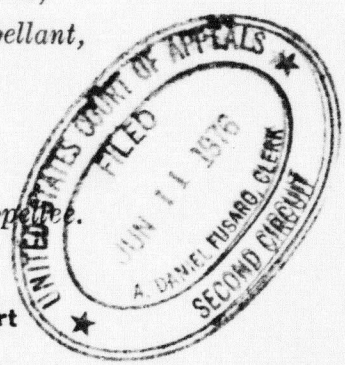
In the Matter of W. T. GRANT COMPANY,
Debtor-in-Possession,

BALTIMORE GAS AND ELECTRIC COMPANY,
Petitioner-Appellant,

—v—

W. T. GRANT COMPANY,
Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of New York



REPLY BRIEF OF PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT BALTIMORE GAS AND ELECTRIC COMPANY

INTRODUCTORY STATEMENT

Baltimore Gas and Electric Company ("BG&E") files this Reply Brief in response to the three arguments which Respondent-Appellee W.T. Grant Company ("Grant") presses on

this appeal. Grant argues: (1) that this Court should adopt the view of the Fifth Circuit in Fontainebleau* in preference to its own decision in Slenderella;** (2) that a bankruptcy court has equitable power to enjoin interference with its jurisdiction even where no property subject to its jurisdiction is involved; and (3) that this Court should not exercise its discretion to find this dispute "capable of repetition, yet evading review" under the recognized exception to the mootness doctrine.

I. NO PROPERTY OF THE DEBTOR IS INVOLVED

Grant places great reliance on the Fifth Circuit's Fontainebleau decision, which, of necessity, was followed by the Northern District of Georgia in Securities Investment.*** Such reliance is misplaced, since to the extent that these cases stand for the propositions claimed by Grant, they are inconsistent and irreconcilable with Judge Moore's decision in Slenderella, a decision expressly rejected in Fontainebleau (508 F.2d at 1059).

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* In re Fontainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975)

** Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 286 F.2d 488 (2d Cir. 1961)

*** In re Securities Investment Properties, Inc., 406 F.Supp. 628 (N.D. Ga. 1975). The Court stated: "While this Court finds that appellant's arguments are both cogent and persuasive, we find that the rule prevailing in this Circuit as enunciated in In re Fontainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975), is otherwise." (406 F.Supp. at 633).

Grant also seeks to distinguish this Court's decision in Slenderella by claiming that it involved only telephone numbers, not telephone service, and that it turned on provisions of the utility's tariff different from those at issue herein. Neither distinction can withstand scrutiny. BG&E's initial brief (see pp. 14-15) makes clear that the Slenderella court found telephone service to be an insufficient basis of bankruptcy court jurisdiction under either Section 311 or Section 2(a)(15). Grant further correctly concedes (Grant Brief pp. 13-14) that provisions of the applicable utility tariff control a debtor's right to receive utility service. Since BG&E's tariffs (filed and approved by the Maryland Public Service Commission) expressly reserve to it the right to terminate service where a deposit is not provided upon request, the present case is indistinguishable from Slenderella.

II. A BANKRUPTCY COURT HAS NO EQUITABLE POWER TO ENJOIN ACTS OF A THIRD PARTY WHEN NO PROPERTY OF THE DEBTOR IS INVOLVED

Grant cites a number of cases (Grant Brief at p. 15) in support of its claim that a bankruptcy court has power under Section 2(a)(15) and the All-Writs Act to enjoin any act of any party having any possible indirect impact on the ultimate rehabilitation of the debtor. Yet all of these cases involve actions of a bankruptcy court to prevent interference with

property of the debtor, under the acknowledged principle that a court has power to issue an injunction to protect its jurisdiction. In not one of these cases did the court rely on Section 2(a)(15) to assert jurisdiction over a party not otherwise interested in the assets of the debtor as a potential claimant against the estate.* Thus the "leading"

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* Indeed, two of the cases cited by Grant expressly rejected the "long-arm" jurisdiction which they allegedly support. In In re Nine North Church Street Inc., 82 F.2d 186 (2d Cir. 1936) a panel of this Circuit held that where "... there is no obligation running from the debtor to the appellants and the appellants are not seeking to interfere with the debtor's property,...the court below as to claims against Maryland was without jurisdiction, since the prosecution of such claims would not interfere with the debtor's property." 82 F.2d at 189. The Court expressly distinguished the Continental Bank case, noting that: "If they sought here to enforce their foreclosure rights over the debtor's property, they could, be enjoined. Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island R. Co., [other citations omitted]."

Similarly, although the Fifth Circuit granted a temporary injunction against termination of a licensing agreement in In re Schokbeton Industries, Inc., 449 F.2d 321 (5th Cir. 1971), dissolution of the injunction was subsequently affirmed by the same Circuit in Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 (5th Cir. 1972), on the grounds that: "The filing of an arrangement petition under Chapter XI does not divest the debtor in possession of its contractual rights but it likewise does not provide a blanket exemption from contractual obligations. Debtor's failure to satisfy those obligations justified Products' termination of the agreement." The Fifth Circuit stated: "[D]id the concededly pervasive authority of the referee permit him to preserve Debtor's contractual rights by indefinitely postponing the performance required by the terms of the contract (i.e., the payment of past due royalties)? We hold that it did not." Furthermore, the Court concluded that the "...Debtor must live with its forfeiture," despite express findings in the record that "loss of the exclusive franchise will seriously jeopardize Debtor's competitive position and cause it irreparable harm." (466 F.2d at 177).

Continental Illinois* case discussed by Grant simply approved the jurisdiction of the bankruptcy court to enjoin a claimant's foreclosure on collateral of the debtor pledged to it. Here, by contrast, BG&E makes no claim against property of Grant. BG&E asserts the Bankruptcy Court has no jurisdiction because Grant has no "property" right in gas or electricity not yet supplied to Grant. Furthermore, BG&E has quoted language from this Circuit's Slenderella opinion which expressly forecloses any assertion of ancillary jurisdiction under Section 2(a)(15) (see BG&E Initial Brief at p. 22).

Grant argues further that even though the Bankruptcy Court has no jurisdiction under Section 311, that Court's equitable powers authorize it to require a utility to continue gas and electric service on credit terms more liberal than those allowed by the utility's filed tariff. Again, BG&E strenuously disagrees. Although BG&E is obligated by Maryland law to provide service, it is obligated to do so (and may do so) only in compliance with its filed tariffs. The Bankruptcy Court has no more authority to order a utility to extend credit on terms more liberal than those set forth in its tariff than it has to require wholesale suppliers of merchandise to continue selling goods to the debtor on credit. As noted by Grant in its application for Chapter XI status, a supply of merchandise is at least as necessary to the debtor's rehabilitation as continued electric and gas service. However, just as the marketplace determines whether the supplier of goods will extend credit, or even

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* Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648 (1935).

deal, with a debtor-in-possession, the filed tariffs of a utility determine the terms upon which it shall supply service to the debtor-in-possession. In either case, any debtor with a reasonable expectation of rehabilitation can and must accommodate itself to such requirements; it is only a refusal to do so which will threaten its chances for rehabilitation. Therefore Grant's argument that payment of a deposit for utility service must necessarily frustrate a debtor's rehabilitation cannot be upheld.*

III. A BANKRUPTCY COURT CANNOT EXCUSE COMPLIANCE WITH "VALID STATE LAW"

Grant's insistence that there is an inconsistency between state law permitting a utility to seek a deposit and the federal bankruptcy law is unsupported and misleading. Grant's suggestion that BG&E is analogous to a secured creditor seeking to foreclose on a debtor's assets under state law completely misses the point that BG&E is not prosecuting a pre-filing claim against the estate of the debtor; rather BG&E is seeking to enforce a requirement which applies only to the

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* At the hearing held on November 5, 1975, Grant admitted that the payment of a two-month deposit to all the utilities by which it was then supplied would require a cash outlay of only $2,724,000 (JA-117). As of October 29, 1975 Grant's cash assets exceeded $100 million dollars (JA-62), and BG&E is informed that their amount exceeded $260 million by December 1975 (See Wall Street Journal, December 12, 1975 at 16:2). Satisfaction of obligations amounting to substantially less than 3% of its cash on hand can hardly be viewed as necessarily fatal to the debtor's opportunity for rehabilitation.

operation of the debtor's business under state law, consistent with 28 U.S.C. §959(b).

The authority cited by Grant in support if its Supremacy Clause claim is totally misleading. Grant's initial statement that its position is "well established" overlooks the fundamental inconsistency between Fontainebleau and Slenderella; leaving aside its distinguishable features, the Fifth Circuit view is certainly not "well established" in this Circuit. Grant's quotation of a passage from the Penn-Central* District Court opinion suggesting the invalidity of state law is equally misleading in view of the Third Circuit's express avoidance of that issue on appeal; see BG&E's Brief at pp. 33-34. Finally, the California P.S.C. opinion** cited by Grant (Grant Brief at p. 32) not only lacks precedential value in this proceeding, but supports BG&E's view that under 28 U.S.C. §959(b) the state public service commission is the appropriate forum in which to balance the competing interests of a utility and a bankrupt customer.

IV. THIS CASE SHOULD NOT BE DISMISSED AS MOOT

Grant argues that the Court should not exercise its discretion to hear this case under the "capable of repetition,

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* In re Penn-Central Transportation Co., 328 F.Supp. 1276 (E.D. Pa. 1971), aff'd 467 F.2d 100 (3d Cir. 1972).

** 101 Plating Corp. v. The Pacific Telephone and Telegraph Co., Case No. 9313 (Cal. P.U.C., December 17, 1974).

yet evading review" exception to the mootness doctrine. Grant also insists that the only two cases which have applied the exception in the context of a bankruptcy appeal (the decisions below and in Securities Investment) should be disregarded by the Court.

BG&E submits that this case is indeed "capable of repetition, yet evading review," contrary to Grant's baseless and unsupported assertions to the contrary.

(1) BG&E has a substantial and continuing interest in the outcome of this controversy, since it will repeatedly be similarly aggrieved by future orders of the type at issue herein if review by this Court is denied;

(2) the issues presented on this appeal transcend the individual interests of the parties before the court: BG&E's interest in securing review of the order of the Bankruptcy Court herein is shared by its ratepayers, who will be forced to bear the burden of uncollectible account losses resulting from continued exercise of the Bankruptcy Court's asserted jurisdiction over utility service;*

(3) this case is ripe for decision, since the controlling issues have been contested with the necessary

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* BG&E's losses on uncollectible accounts amounted to $1,489,054 in 1975, an increase of nearly 75% over its 1974 losses of $858,301.

vigor and adverseness, have been framed with the required specificity and are presented for decision on a complete and fully-developed factual record; and,

(4) failure to resolve BG&E's claims at this time would be contrary to both the interest of it and its ratepayers in prompt adjudication and the greater public interest in freeing the courts from repetitious, costly and time-consuming litigation.

Grant takes the position that the applicability of the "capable of repetition, yet evading review" exception turns on whether Chapter XI proceedings are generally so short-lived as to deny an aggrieved party its right to complete appellate review. The statistics cited to the contrary by Grant (Grant Brief, p. 39) are completely meaningless since they reveal at most a periodic fluctuation in the number of arrangement petitions filed.* Grant's further claim that the exception may be applied only when "virtually all" cases of

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* The Court should note that a comparison of the number of cases filed with the number of cases adjudicated in a particular period reveals nothing about the duration of an average case. Grant attempts to mislead the Court by selecting figures for 1974, the year which showed the greatest single percentage increase in Chapter XI filings in the Southern District of New York. The court should be aware that over the past decade nationwide Chapter XI filings have risen and fallen in relation to prevailing economic conditions; thus during the period from 1964 through 1968, adjudications and dismissals exceeded filings. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics (Tables F2 and F4B).

a particular type will evade review is equally baseless. Research has failed to produce a single case in which such a standard was applied. The generally applied standard has been set forth by the District of Columbia Circuit as follows: "...cases are not made moot by the expiration of order of brief duration, capable of repetition." Friend v. United States, 388 F.2d 579, 581 (D.C. Cir. 1967).

Grant also incorrectly argues that both a governmental defendant and an application for declaratory relief are prerequisites to application of the exception. In a number of cases the courts have waived the mootness issue over the objections of a private defendant where necessary to insure full litigation of the plaintiff's claim.* Nor has a failure to seek declaratory relief been held to bar such an exercise of judicial discretion.** This is particularly true in the instant case, since the injunction which BG&E seeks to have dissolved remains in force.

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* Pittsburgh Newspaper Printing Pressmen's Union, No. 9 v. Pittsburgh Press Co., 479 F.2d 607 (3d Cir. 1973); Atlantic Richfield Co. v. O.C.A.W. Int'l Union, 447 F.2d 945 (7th Cir. 1971); Pacific Maritime Assoc. v. Int'l Longshoremen's and Warehousemen's Union, 454 F.2d 262 (9th Cir. 1971).

** Squillacote v. Graphic Arts Int'l Union, Local 277, 513 F.2d 1017 (7th Cir. 1975); United Air Lines v. CAB, 518 F.2d 256 (7th Cir. 1975); Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir. 1975).

Finally, Grant insists that no "policy" of the bankruptcy court is involved here, since each ruling on the need for or amount of a deposit represents an "independent exercise of discretion." On the contrary, every such assertion of "discretion" will be in direct conflict with BG&E's fundamental position that there is never any jurisdictional basis for a Bankruptcy Judge to dictate terms of utility service. BG&E's dispute is quite clearly with Judge Galgay and other Bankruptcy Judges who have announced and continue to follow a policy which disregards the law of this Circuit. Termination of the underlying bankruptcy proceedings should therefore not be permitted to frustrate the public interest in a full examination of this policy by this Court, especially since appeal within the context of the bankruptcy proceedings was the sole method of review available to BG&E.*

CONCLUSION

The Bankruptcy Court had no power to compel BG&E to provide service on credit terms more favorable than those set forth in its duly filed tariffs. The purported authority cited by Grant to the contrary cannot outweigh this Circuit's express holding that (1) utility service does not constitute property of the debtor under Section 311 and (2) ancillary jurisdiction over utility service cannot be laid under Section 2(a)(15). Furthermore, the public interest demands that resolu-

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* Bankruptcy Rule No. 801.

tion of this dispute not be deferred on the grounds of mootness, since the identical conflict between the previous decisions of this Circuit and the asserted jurisdiction of the Bankruptcy Court are certain to recur in the absence of such a determination by this Court.

The decision appealed from should be reversed.

Respectfully submitted,

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